

MOTION FILED
DEC 14 1989

(15)

No. 89-390

**In the
Supreme Court of the United States**

October Term, 1989

PENSION BENEFIT GUARANTY CORPORATION,
Petitioner,

v.

THE LTV CORPORATION, LTV STEEL COMPANY,
INC., OFFICIAL COMMITTEE OF UNSECURED
CREDITORS OF LTV CORPORATION,
SUBCOMMITTEE OF PARENT CREDITORS OF THE
OFFICIAL COMMITTEE OF UNSECURED
CREDITORS OF LTV CORPORATION, LTV BANK
GROUP, OFFICIAL COMMITTEE OF EQUITY
SECURITY HOLDERS, BANCTEXAS DALLAS, N.A.,
FIFTH THIRD BANK, HUNTINGTON NATIONAL
BANK, CITIBANK, N.A., DAVID H. MILLER AND
WILLIAM W. SHAFFER,

Respondents

**Motion for Leave to File and
Brief Amicus Curiae of Retired Employees Benefits
Coalition, Inc.**

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9 pp

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Retired Employees' Benefits Coalition, Inc. (REBCO) hereby moves this Court for leave to file a brief amicus curiae in support of the Pension Benefit Guaranty Corporation's appeal to enforce the Restoration Notice in this captioned case, pursuant to Rule 36.3 of the Supreme Court Rules.

In support of the motion, REBCO states as follows:

1. REBCO is a not-for-profit Pennsylvania corporation. Its 11,100 members consists of retired salaried employees of Bethlehem Steel Corporation (Bethlehem) and spouses. REBCO members are plan participants in Bethlehem's pension plans.

2. REBCO's members and spouses have a direct interest in the outcome of this case. As plan participants in Bethlehem's pension plans, REBCO's members have an interest in a strong and well-financed Pension Benefit Guaranty Corporation (PBGC). The failure of the Court of Appeals for the Second Circuit to enforce the Restoration Notice issued by the PBGC transfers the enormous burden of LTV Corp.'s pension plan terminations to other pension plan sponsors, including Bethlehem.

3. Bethlehem, as a major competitor of LTV Steel, has been and will continue to be adversely impacted by LTV's transfer of unfunded pension liabilities to the PBGC. LTV Steel has gained a sizable competitive edge against Bethlehem in the domestic and international steel markets by transferring responsibility for over two billion dollars in pension liabilities to the PBGC. Bethlehem is attempting to modernize and restructure facilities, but has not shed its pension liabilities onto the PBGC. Bethlehem continues to meet ERISA's minimum funding standards. Allowing LTV to convert the pension guaranty program into a federal bailout program for one steel manufacturer places in jeopardy Bethlehem's ability to fund adequately its pension plans, to the disadvantage of REBCO members and spouses.

4. Counsel for REBCO has requested consent of the parties below to file the accompanying Brief Amicus Curiae. REBCO has received consent of the PBGC, LTV Corp. and LTV Steel, the Parent Creditors of the Official Committee of Unsecured Creditors, the Official Committee of Equity Security Holders, David H. Miller and William W. Schaffer, Huntington National Bank, and BancTexas*. The remaining parties below have not responded as of the time of press. For the foregoing reasons, REBCO seeks leave of this Court to file the following brief amicus curiae in support of the PBGC in the captioned appeal.

Respectfully submitted,

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Dated: December 14, 1989

*A copy of each written consent will be filed with the Clerk when received.

TABLE OF CONTENTS

	Page
Interest of Amicus	1
Statement	2
Summary of Argument	4
Conclusion	5

INTEREST OF AMICUS

The membership of the Retired Employees' Benefits Coalition, Inc. (REBCO) consists of retired salaried employees of Bethlehem Steel Corporation (Bethlehem) and spouses. REBCO members are plan participants in Bethlehem's pension plans.

REBCO's 11,100 members and spouses have a direct interest in the outcome of this case for two reasons. First, as plan participants in Bethlehem's pension plans, REBCO's members have an interest in a strong and well-financed Pension Benefit Guaranty Corporation (PBGC). The failure of the Court of Appeals for the Second Circuit to enforce the Restoration Notice issued by the PBGC transfers the enormous burden of LTV Corp.'s pension plan terminations to other pension plan sponsors, including Bethlehem. This failure to enforce the Restoration Notice jeopardizes the financial health of the insurance program, and, in all likelihood, forcing yet another increase in PBGC insurance premiums.

Second, Bethlehem, as a major competitor of LTV Steel, has been and will continue to be adversely impacted by LTV's transfer of unfunded pension liabilities to the PBGC. LTV Steel has gained a sizable competitive edge against Bethlehem in the domestic and international steel markets by transferring responsibility for over two billion dollars in pension liabilities to the PBGC. Bethlehem is attempting to modernize and restructure facilities, but has not shed its pension liabilities onto the PBGC. Bethlehem continues to meet ERISA's minimum funding standards. Allowing LTV to convert the pension guaranty program into a federal bailout program for one steel manufacturer places in jeopardy Bethlehem's ability to fund adequately its pension plans, to the disadvantage of REBCO members and spouses.

STATEMENT

1. Our Coalition, REBCO, was officially incorporated in 1987 as the "Retired Employees' Benefits Coalition, Inc." We are a not-for-profit Pennsylvania corporation.

There are approximately 16,000 retired Bethlehem Steel SALARIED employees we represent: clerical & technical people, mill foremen, superintendents, plant managers, salesmen, corporate staff and management people. None of our members is represented by a union.

Bethlehem has a pension fund which is underfunded by approximately 800 million dollars. This underfunding places in jeopardy pension payments to our members. Sustained profitability is a "key" element for the elimination of Bethlehem's underfunded pension plans. Sustained profitability will be more difficult for Bethlehem to achieve so long as LTV Steel enjoys labor costs advantages in part derived from having dumped certain employee benefits onto PBGC.

Bethlehem has labor costs greater than LTV Steel because, in large part, LTV Steel dumped certain retirement costs on the Federal Government.

From 1987 through early 1989, demand for steel has been relatively high. In such an environment, LTV has had no real need to use its cost advantage to maintain or increase its market share. However, today, the decrease in demand gives an unfair cost advantage to LTV Steel and gives LTV Steel considerable pricing flexibility to reduce prices and maintain its market share to the detriment of Bethlehem and other steel companies which have continued to meet their pension obligations. This is particularly unfair and unwarranted when the ability of LTV Steel to afford the restored plan has been demonstrated by the PBGC.

2. REBCO members and spouses depend on their Bethlehem pension payments on a day-to-day basis. The retirees invested time with their company. They retired with the expectation of receiving **promised** benefits. Bethlehem retirees, spouses, and fellow retirees of other basic steel producers, deserve fairer treatment than an undermining of these benefits.

Action by LTV Steel to renege on prior promises and contracts made in good faith, especially where it concerns essential employee benefits, should not be allowed to continue.

Retirees are different. They are individuals, not corporate entities. They have a planned reliance on retirement benefits — for which they worked a lifetime. These benefits must not be easily or quickly washed away.

The fear and harm of lost benefits affect not just Bethlehem retirees, but all retirees — within and without the steel industry — who have been promised benefits upon which they have planned their retirement years.

Retiree pension benefits are not a luxury; they are central to the well being of retired Americans. Fairness dictates that retirees be treated equitably and in good faith by their former employer and by our laws.

3. Salaried Bethlehem retirees do not have the collective strength of a union. They cannot strike their former employer to protect earned pensions. To whom shall salaried Bethlehem retirees look to protect earned pension benefits? They look, in part, to Congress, to PBGC, and to our judicial system.

4. The Court Appeals for the Second Circuit's decision undermines Congressional policy and elevates LTV Steel's interest over that of plan participants in the context of restoration. The requirement placed on the PBGC to demonstrate long term financial stability before restoration of a terminated plan shifts the burden Congress assigned to the employer in the distress provisions.

Not only does the decision impair the PBGC's administration of the pension insurance system, but it relegates plan participants, including REBCO members and spouses, to a position subservient to LTV Steel. The decision of the Court of Appeals minimizes the interests of plan participants that Congress plainly sought to protect. Rather than require the employer ineligible for distress termination to continue a pension plan during a period of financial uncertainty, plan participants must suffer the loss of promised pension benefits until the PBGC establishes that it is certain the employer will be able to fund the plan into the foreseeable future. The decision is thus fundamentally at odds with the clearly articulated Congressional policy requiring the employer to fulfill pension promises to plan participants until the employer demonstrates the severe hardship necessary for distress termination.

SUMMARY OF ARGUMENT

1. PBGC acted within its authority when it restored the LTV plans as a remedy for the establishment of abusive follow-on plans.

2. PBGC has broad authority to restore terminated plans when necessary to block abuse.

3. The Court of Appeals restricted PBGC's authority by an egregious misuse of legislative history.

4. The PBGC's policy against abusive follow-on plans derives from its expertise and experience with the operation of the federal insurance program. Follow-on plans undermine the statutory limitations on the PBGC's guarantee and eliminate its insurable event — plan termination. They divert insurance funds — intended to be used to provide basic benefits to workers at plan termination — to subsidize an employer's ongoing operations and benefit programs. By eliminating the adverse consequences associated with termination, follow-on plans make invocation of the federal guarantee an irresistible alternative for financially troubled employers and thereby threaten the solvency of the insurance program. The parties most at risk are the plan participants, including retirees and spouses.

5. PBGC's exercise of its discretion was not precluded by Congress and was not unreasonable. The Court of Appeals should not have substituted its judgement for that of the agency to which Congress expressly delegated restoration authority.

6. Restoration of the Plans was proper because each of the financial circumstances that had necessitated termination had changed. This decision was one that the agency, in light of its expertise and experience, was particularly well-equipped to make.

CONCLUSION

The decision of the Court of Appeals should be reversed and PBGC's restoration of the Plans should be enforced.

Respectfully submitted,

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December 14, 1989